STATE OF MICHIGAN

COURT OF APPEALS

SUSAN WHELAN, Plaintiff-Appellant,	UNPUBLISHED March 25, 2014
v	No. 311743 Oakland Circuit Court
DONALD WHELAN, Defendant-Appellee.	LC No. 2003-676213-DM

Before: M. J. KELLY, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Plaintiff, Susan Whelan, appeals by leave granted the order denying her motion for declaratory judgment and enforcement of the judgment of divorce.[1] We reverse and remand for proceedings consistent with this opinion.

The court entered the parties' judgment of divorce in October 2003. The judgment of divorce included the following provision:

> Each of the parties represents to the other that to the best of her or his knowledge all property in which he or she has an interest has been disclosed or discovered and that he or she has no property interest that is not specifically provided for in this Judgment. Should either party hereafter discover the existence of any property interest not provided for in this Judgment of Divorce, said property shall be divided equally, provided however, that if the existence of said property was knowingly concealed or misrepresented by one party, said party shall be the sole and separate property of the other.

Defendant died in 2008, and an estate was opened in Oakland County Probate Court.

In 2010, plaintiff learned from West Bay Exploration Company of a 50% interest in oil, gas and mineral rights in real estate located in Jackson County. This asset was not specifically

[1] Defendant, Donald Whelan, died in 2008. The lower court allowed the decedent's estate to represent defendant's interests.

indentified in the consent judgment of divorce. It was alleged that defendant acquired a 50% interest in the real property before the parties' marriage. The remaining 50% was owned by a woman named Mary Berry. Berry and the parties conveyed their interests to the property in June 1997, but they retained 50% of all oil, gas and mineral rights. Both parties signed the warranty deed. Defendant's estate asserted that plaintiff merely acquired dower rights in the property upon her marriage to defendant. It further contended that plaintiff was fully informed of the 1997 transaction and that she signed the warranty deed to convey the property free of her dower interest.

Although plaintiff acknowledged her signature on the warranty deed she asserted that she forgot about this property interest. In the complaint to quiet title, the estate also indicated that the decedent forgot about the interest.[2] Accordingly, the parties agree they both forgot about this property interest. In 2009, West Bay Exploration Company successfully drilled for oil and/or natural gas on the property, generating royalties for the owners of the mineral interests. Although the estate filed a complaint to quiet title in another circuit, on plaintiff's motion, the Oakland Circuit Court reopened the divorce action to exercise its exclusive, continuing jurisdiction over this matter. The lower court rejected plaintiff's request for 50% interest in the mineral rights pursuant to the terms of the judgment of divorce, stating:

> It is clear that Plaintiff knew of the Retained Mineral Interests before entry of the Judgment, as evidenced by her signature on the deed creating the Retained Mineral Interests. One cannot discover something if s/he was aware of it before . . . . Since Plaintiff signed the Deed creating the Retained Mineral Interests, it is conclusively established that she knew its contents. . . . The fact that Plaintiff's signature was notarized satisfies the Estate's burden of proof that the signature is hers. In any case, Plaintiff cannot raise duress or other defenses as she responded to requests to admit and interrogatories and in response to Defendant's discovery requests that she does not remember. In the absence of discovery of the Retained Mineral Interests after the entry of the Judgment, the provision that Plaintiff relies on to award her 50% interest is not applicable and does not create the property right she seeks.

From this ruling, plaintiff appeals the trial court's interpretation of the judgment.

When the parties stipulate to the facts, appellate review is primarily concerned with the law. *In re Butterfield Estate*, 405 Mich 702, 715; 275 NW2d 262 (1979); *Brandon Charter Twp v Tippett*, 241 Mich App 417, 421 n 1; 616 NW2d 243 (2000). "Application of the law to the facts presents a question of law subject to review de novo." *Book-Gilbert v Greenleaf*, 302 Mich App 538, 542; 840 NW2d 743 (2013). The burden is on the plaintiff to demonstrate the existence of the contract sought to be enforced, and the court cannot make a contract for the parties. *Hammel v Foor*, 359 Mich 392, 400; 102 NW2d 196 (1960). Settlement agreements should not normally be set aside, and once a settlement is reached, a party may not disavow it.

[2] The complaint to quiet title provided: "On information and belief, both parties had simply forgotten about the Retained Mineral Interest."

Vittiglio v Vittiglio, 297 Mich App 391, 399; 824 NW2d 591 (2012). Courts are bound by property settlements reached through negotiations and agreements by parties to a divorce action in the absence of an exception such as fraud or duress. *Id*. at 400. A divorce judgment resulting from an agreement by the parties constitutes a contract. *Rose v Rose*, 289 Mich App 45, 49; 795 NW2d 611 (2010). The existence and interpretation of a contract presents a question of law subject to de novo review. *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012); *Holmes v Holmes*, 281 Mich App 575, 587; 760 NW2d 300 (2008). Simply stated:

> Judgments entered pursuant to the agreement of parties are of the nature of a contract. Furthermore, a settlement agreement, which is what this property settlement agreement is, is a contract and is to be construed and applied as such. Absent a showing of factors such as fraud or duress, courts act properly when they enforce such agreements. Interpretation of unambiguous and unequivocal contracts is a question of law. [*Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994) (citations omitted).]

The following rules apply to contracts:

> "The essential elements of a contract are parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation." Issues regarding the proper interpretation of a contract or the legal effect of a contractual clause are reviewed de novo. When interpreting a contract, the examining court must ascertain the intent of the parties by evaluating the language of the contract in accordance with its plain and ordinary meaning. If the language of the contract is clear and unambiguous, even if inartfully worded or clumsily arranged, when it fairly admits of but one interpretation. Every word, phrase, and clause in a contract must be given effect, and contract interpretation that would render any part of the contract surplusage or nugatory must be avoided. [*McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 694; 818 NW2d 410 (2012) (citations omitted).]

In the present case, the lower court held that plaintiff did not "hereafter discover" the property at issue because she signed the warranty deed before the judgment of divorce was executed. This interpretation does not abide by the rules of contract construction wherein the document must be interpreted as a whole with every word and phrase given effect. *Id*. Unambiguous contract language must be construed as a whole according to the plain and ordinary meaning. *Radu v Herndon & Herndon Investigations, Inc*, 302 Mich App 363, 374; 838 NW2d 720 (2013). "Thus, when reading the terms of a contract according to their commonly used meaning, courts must also consider that 'under the doctrine of *noscitur a sociis*, a word or phrase is given meaning by its context or setting.'" *Miller-Davis Co v Ahrens Constr, Inc (On Remand)*, 296 Mich App 56, 65; 817 NW2d 609 (2012) (citation omitted). "When construing an exception to a general rule, care must be taken not to derogate from the general rule to the extent that its intent and purpose is undermined." *Vargo v Svitchan*, 100 Mich App 809, 823; 301 NW2d 1 (1980).

A review of the judgment of divorce reveals that the parties' assets were substantial. There were multiple properties, vehicles, and personal property to be divided. Additionally,

plaintiff was awarded spousal and child support. The disclosure of assets provision was located at the end of the consent judgment, following the property division. Its location and language indicates that it was a catch-all provision designed to govern potential oversights or omissions from the property division in the judgment. *Miller-Davis*, 296 Mich App at 65. Moreover, the lower court only considered the phrase "hereafter discover" and considered only the timing of the discovery. However, the sentence as a whole provides: "Should either party hereafter discover the existence of any property interest not provided for in this Judgment of Divorce, said property shall be divided equally . . . ." The location of this provision and its language as a whole indicates that it was designed to cover property that was not included in the judgment of divorce. Moreover, we note that the trial court's rationale, that plaintiff did not hereafter discover the interest because of her signature, applies with equal force to defendant. That is, he similarly signed off on the provision, thereby indicating that he could not have later discovered the existence. It is unclear why his forgetfulness would warrant a windfall in his favor of the entire interest. In light of the fact that both parties forgot about this interest, pursuant to the plain language of the divorce judgment, the asset must be split equally because there is no allegation of knowing concealment or misrepresentation. Therefore, in light of the parties' apparent agreement that the retained mineral interest was forgotten, it is subject to equal division in light of the language of the judgment of divorce.[3] Accordingly, we reverse the court's ruling and remand for proceedings consistent with this opinion.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, the prevailing party, may tax costs. MCR 7.219.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood

[3] We note that the estate made various representations regarding the type of interest that plaintiff acquired and alleged that it was merely a dower interest. However, there was no stipulation regarding the type of interest, and no documentary evidence to support the estate's assertions. The plain language of the warranty deed merely alleged that the parties conveyed "an undivided ½ interest." There is no indication in the deed that plaintiff's interest was merely a dower interest, and the underlying evidence of the decedent's interest was not presented. Therefore, it is unknown if this was the decedent's separate property that he maintained separately following the marriage or if he commingled his property such that plaintiff acquired more than a dower interest. The trial court erred in relying on the estate's blanket assertions. Moreover, the judgment of divorce expressly provided that the provisions of the judgment of divorce governed "in lieu of" dower. The estate's *argument* regarding dower does not supersede the terms of the judgment in the absence of supporting documentation. In light of our disposition, plaintiff's challenge to the Canadian property is more appropriately raised in the trial court.